

2004

# State of Utah v. Ronald Kent Jacobsen : Brief of Appellant

Utah Court of Appeals

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Scott L. Wiggins; Arnold & Wiggins; Attorneys for Appellant.

Brandon L. Poll; Deputy Davis County Attorney; Attorney for Appellee.

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	)	
	)	
Plaintiff / Appellee,	)	Case No. 20040420-CA
	)	
v.	)	
	)	
RONALD KENT JACOBSEN,	)	
	)	
Defendant / Appellant.	)	

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BRIEF OF APPELLANT

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Appeal from Sentence, Judgment, and Commitment entered on April 21, 2004, in the Second District Court, Davis County, the Honorable Darwin C. Hansen, presiding.

---

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DEPUTY DAVIS COUNTY ATTORNEY  
800 West State Street  
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*Attorneys for Appellee*

FILED  
UTAH APPELLATE COURTS

MAR 05 2007

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	)	
	)	
Plaintiff / Appellee,	)	Case No. 20040420-CA
	)	
v.	)	
	)	
RONALD KENT JACOBSEN,	)	
	)	
Defendant / Appellant.	)	

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BRIEF OF APPELLANT

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### STATEMENT OF JURISDICTION

The Utah Court of Appeals is conferred with jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e) (2002).

### STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. Whether appointed trial counsel denied Mr. Jacobsen of the Sixth Amendment right to the effective assistance of counsel by failing to request that prospective juror Prograss be removed for cause or failing to remove him by peremptory challenge. To make such a showing, a defendant must show, first, that counsel rendered a deficient performance, falling below an objective standard of reasonable professional judgment, and, second, that counsel's performance was prejudicial. *Bundy v. DeLand*, 763 P.2d 803 (Utah 1988). The appellate court reviews such a claim as a matter of law. *State v. Maestas*, 1999 UT 32, ¶20, 984 P.2d 376.

#### Preservation of Issue Citation or Statement of Grounds for Review:

Issues involving claims of ineffective assistance of counsel constitute an exception to the preservation rule and as such may be raised for the first time on appeal.

2. Whether the trial court committed plain error by not pursuing the dismissal of prospective juror Prograss similar to that of the other prospective jurors. In *State v. Dunn*, 850 P.2d

1201 (Utah 1993), this Court outlined the following principles involved in determining whether "plain error" exists:

In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

*Id.* at 1208-09.

Preservation of Issue Citation or Statement of Grounds for Review:

Issues involving plain error constitute an exception to the preservation rule and as such may be raised for the first time on appeal.

**DETERMINATIVE AUTHORITY**

The constitutional provisions, statutes, ordinances, rules, regulations, or case law whose interpretation is determinative, are set out verbatim, with the appropriate citation, in the body and arguments of the instant Brief of Appellant.

**STATEMENT OF THE CASE**

This case involves the failure to remove a prospective juror for cause or by peremptory challenge. These failures precluded Defendant of the right to a fair trial.



Defendant was charged with Abuse or Neglect of a Disabled or Elder Adult and Assault. He pleaded not guilty to the charges.

Defendant subsequently appeared for a jury trial. At the conclusion of trial, Defendant was convicted on both counts.

On that same day, the trial court sentenced Defendant as follows. Based on the conviction of Abuse or Neglect of a Disabled or Elder Adult, the trial court sentenced Defendant to a term of 365 days in the Davis County Jail, of which it suspended 325 days; and as to the conviction of Assault, the trial court sentenced Defendant to a term of 180 days in the Davis County Jail, which the trial court suspended. Defendant thereafter filed a timely pro se notice of appeal.

#### **STATEMENT OF FACTS**

1. Mr. Jacobsen was charged with Abuse or Neglect of a Disabled or Elder Adult in violation of Utah Code Ann. § 76-5-111(3)(a), a class A misdemeanor, and Assault in violation of Utah Code Ann. § 76-5-102, a class B misdemeanor (R. 1-2). See Information, R. 1-2, a true and correct copy of which is attached hereto as Addendum A.

2. On September 29, 2003, Mr. Jacobsen appeared before the district court and pleaded not guilty (R. 10-11).

3. Mr. Jacobsen appeared for a jury trial on April 16, 2004 (R. 67-70).

4. During jury selection, the trial court asked the prospective jurors whether any of them have close friends or family members that work in law enforcement (R. 117:18:19-20). Prospective juror John Richard Prograss responded that he had a "close friend that's on the Utah Highway Patrol." (R. 117:21:14-15).

5. The trial court asked Mr. Prograss if he would "be inclined to give more credibility to a police officer who testifies as opposed to a lay witness in court." (R. 117:22:1-3). Mr. Prograss responded, "I don't know if I'd give more credibility, but I think they probably pay attention to detail a little bit more than the average person." (R. 117:22:4-6).

6. The trial court then inquired, "At this stage of the proceedings, would your tendency be to favor the prosecution over the defense? (R. 117:22:7-8). Mr. Prograss responded, "No." (R. 117:22:9).

7. The final six persons selected to sit on the jury included Mr. Prograss (R. 117:39:14-16).

8. At the conclusion of trial, the jury convicted Mr. Jacobsen on both counts (R. 117:132:2-8).

9. That same day, the trial court imposed sentence. (R. 68). Based on the conviction of Abuse or Neglect of a Disabled or Elder Adult, the trial court sentenced Mr. Jacobsen to a term of 365 days in the Davis County Jail, of which it suspended 325 days. (R. 68). As to the conviction of Assault, the trial court sentenced Mr. Jacobsen to a term of 180 days in the Davis County Jail, which the trial court suspended. (R. 68-69). See Sentence, Judgment, Commitment, R. 67-70, a true and correct copy of which is attached hereto as Addendum B.

10. Mr. Jacobsen filed a timely pro se notice of appeal (R. 71).

#### **SUMMARY OF ARGUMENTS**

1. Trial counsel denied Mr. Jacobsen of his Sixth Amendment right to the effective assistance of counsel by failing to request that prospective juror Progross be removed for cause or failing to remove him by peremptory challenge. Trial counsel's failure to request that Progross be removed for cause or failing to remove him by peremptory challenge fell below an objective standard of reasonable professional judgment. The record demonstrates that trial counsel was so inattentive or indifferent during the jury selection process that the failure to remove Progross was not the result of a conscious choice or preference. In fact, except for

his brief introduction to the jury, trial counsel made no effort to object or comment during jury selection.

But for counsel's unprofessional error of failing to request that Progeess be removed for cause or failing to remove him by peremptory challenge, the result at trial would have been different. Had trial counsel objected, the trial court, based on questioning utilized with other prospective jurors, would have erred by not removing Progeess.

2. The trial court committed plain error by not pursuing the dismissal of prospective juror Progeess similar to that of the other prospective jurors. The trial court erred by failing to pursue further questioning of and dismissal of prospective juror Progeess even though the trial court pursued such questioning of and dismissal of other prospective jurors. The error should have been obvious in light of the dismissal of the other prospective jurors during jury selection. Finally, the error was harmful because it denied Mr. Jacobsen of the right to a fair trial.

## ARGUMENTS

### **I. TRIAL COUNSEL DENIED MR. JACOBSEN OF HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST THAT PROSPECTIVE JUROR PROGRESS BE DISMISSED FOR CAUSE OR FOR FAILING TO REMOVE HIM BY PEREMPTORY CHALLENGE.**

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct 2052 (1984), the United States Supreme Court established a two-prong test for determining when a defendant's Sixth Amendment<sup>1</sup> right to effective assistance of counsel has been denied. *Id.* at 687, 104 S.Ct. at 2064. As adopted by Utah courts, this test requires a defendant to show "first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced the defendant." *Bundy v. Deland*, 763 P.2d 803, 805 (Utah 1988); *State v. Perry*, 899 P.2d 1232, 1239 (Utah Ct. App. 1995); *State v. Wright*, 893 P.2d 1113, 1119 (Utah Ct. App. 1995). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," or, in this case, a fair

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<sup>1</sup>The Sixth Amendment to the United States Constitution states in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

sentencing. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, (1993).

To satisfy the first prong of the test, a defendant must "identify the acts or omissions' which, under the circumstances, 'show that counsel's representation fell below an objective standard of reasonableness.'" *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (quoting *Strickland*, 466 U.S. at 690, 688, 104 S.Ct. at 2066, 2064 (footnotes omitted)). A defendant must "overcome the strong presumption that trial counsel rendered adequate assistance and exercised reasonable professional judgment." *State v. Bullock*, 791 P.2d 155, 159-60 (Utah 1989), *cert. denied*, 497 U.S. 1024, 110 S.Ct. 3270 (1990).

To show prejudice under the second prong of the test, a defendant must proffer sufficient evidence to support "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068; *Templin*, 805 P.2d at 187. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069; *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah 1994); *State v. Frame*, 723 P.2d 401, 405 (Utah 1986).

The appellate court presumes that trial counsel's lack of objection to, or failure to remove, a particular juror was the

result of a plausibly justifiable conscious choice or preference. See *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984). However, the *Strickland* presumption of effectiveness is rebuttable. A defendant may rebut the presumption by showing: (1) that trial counsel was so inattentive or indifferent during the jury selection process that the failure to remove a prospective juror was not the product of a conscious choice or preference; (2) that a prospective juror expressed bias so strong or unequivocal that no plausible countervailing subjective preference could justify failure to remove that juror; or (3) that there is some other specific evidence clearly demonstrating that trial counsel's choice was not plausibly justifiable. *State v. Litherland*, 2000 UT 76, ¶25, 12 P.3d 92.

During jury selection in the instant case, the trial court asked the prospective jurors whether any of them have close friends or family members that work in law enforcement (R. 117:18:19-20). Prospective juror John Richard Prograss responded that he had a "close friend that's on the Utah Highway Patrol." (R. 117:21:14-15).

The trial court asked Prograss if he would "be inclined to give more credibility to a police officer who testifies as opposed to a lay witness in court." (R. 117:22:1-3). Prograss responded, "I don't know if I'd give more credibility, but I think they

probably pay attention to detail a little bit more than the average person." (R. 117:22:4-6).

The trial court then inquired, "At this stage of the proceedings, would your tendency be to favor the prosecution over the defense? (R. 117:22:7-8). Progress responded, "No." (R. 117:22:9) The final six persons selected to sit on the jury included Progress (R. 117:39:14-16), who ultimately served as the foreperson of the jury who convicted Mr. Jacobsen (R. 57, Verdict).

Trial counsel's failure to request that Progress be removed for cause or failing to remove him by peremptory challenge fell below an objective standard of reasonable professional judgment. The record demonstrates that trial counsel was so inattentive or indifferent during the jury selection process that the failure to remove Progress was not the result of a conscious choice or preference. In fact, except for the brief introduction of himself to the jury, trial counsel made no effort to object or otherwise comment during jury selection.

But for counsel's unprofessional error of failing to request that Progress be removed for cause or failing to remove him by peremptory challenge, the result at trial would have been different. Had trial counsel objected, the trial court, based on questioning utilized with other prospective jurors (see R. 117:22-



23 (prospective juror Munson); R. 117:27:4-12 (prospective juror Johnson); R. 117:30-31 (prospective juror Northrop),<sup>2</sup> would have erred by not removing Progress.

**II. THE TRIAL COURT COMMITTED PLAIN ERROR BY NOT PURSUING THE DISMISSAL OF PROSPECTIVE JUROR PROGRESS SIMILAR TO THAT OF THE OTHER PROSPECTIVE JURORS.**

In *State v. Dunn*, 850 P.2d 1201 (Utah 1993), this Court outlined the following principles involved in determining whether "plain error" exists:

In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

*Id.* at 1208-09; see also *State v. Portillo*, 914 P.2d 724, 726 (Utah Ct. App. 1996); and *State v. Tenney*, 913 P.2d 750 (Utah Ct. App. 1996). According to *State v. Verde*, 770 P.2d 116, 121-22 (Utah 1989), "in most circumstances, the term 'manifest injustice' [found in Utah R. Crim. P. 19(c)] is synonymous with the 'plain

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<sup>2</sup>A portion of the jury selection proceedings is attached hereto as Addendum C. See also Argument II, pages 12 through 13.

error' standard expressly provided in Utah Rule of Evidence 103(d)  
 . . . ."

In the instant case, the trial court erred by failing to pursue further questioning of and dismissal of prospective juror Progross even though the trial court pursued such questioning of and dismissal of other prospective jurors. The error should have been obvious in light of the dismissal of the other prospective jurors during jury selection. For example, prospective juror Bart Alan Munson informed the trial court that he had worked with several Farmington City police and that he is close friends with others from the sheriff's office (R. 117:22:12-15). The court then asked him if he would "be more inclined at this stage to give their testimony more credibility simply because they're with the Davis County Sheriff's Office?" (R. 117:22:17-19). To which Munson responded, "I don't think so." (R. 117:22:20). The trial court questioned Munson further by asking, "If you were seated here at defense table as the defendant, and somebody is in the jury with a close relationship between an agency who will be testifying in that trial, would you be uncomfortable?" (R. 117:23:6-9). Munson responded, "Yeah, I think so.", after which the court excused Munson (R. 117:23:10-14). Moreover, the trial court released prospective juror Jessica R. Carlos upon being informed that she could "possibly" be influenced by the fact that

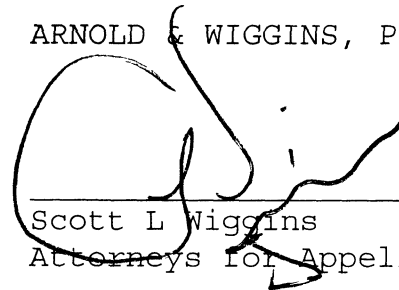
her brother-in-law is an officer for Sunset City (R. 117:26:11-25). Finally, the error was harmful because denied Mr. Jacobsen of the right to a fair trial.

#### CONCLUSION

Based on the foregoing, Mr. Jacobsen respectfully requests that this Court reverse and remand the case to the district court for a new trial and for any further proceedings consistent with this Court's instructions as set forth in its opinion.

RESPECTFULLY SUBMITTED this 26th day of February, 2006.

ARNOLD & WIGGINS, P.C.

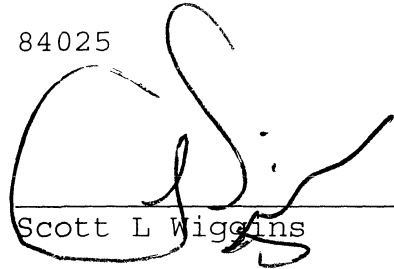


\_\_\_\_\_  
Scott L Wiggins  
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following on this 5 day of March, 2006:

Mr. Brandon L. Poll  
Deputy Davis County Attorney  
800 West State Street  
P.O. Box 618  
Farmington, UT 84025

  
\_\_\_\_\_  
Scott L Wiggins

## **ADDENDA**

Addendum A: Information  
Addendum B: Sentence, Judgment, Commitment  
Addendum C: Partial Transcript of Jury Selection  
Proceedings

Tab A

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Davis County Attorney  
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800 West State Street  
Farmington UT 84025  
Telephone: (801) 451-4300  
Fax: (801) 451-4328

---

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH

---

THE STATE OF UTAH Plaintiff, vs. RONALD KENT JACOBSEN DOB: 05/01/1954, Defendant.	Bail:  <b>INFORMATION</b> Case No. 031701596 MD OTN 14237184 DCH
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The undersigned prosecutor states on information and belief that the defendant, on or about September 26, 2003 at County of Davis, State of Utah, committed the crimes of:

**COUNT 1**

ABUSE OR NEGLECT OF A DISABLED OR ELDER ADULT, (173) 76-5-111(3)(a) UCA, class A misdemeanor, as follows: That at the time and place aforesaid the defendant under circumstances other than those likely to produce death or serious physical injury, intentionally or knowingly caused a disabled or elder adult to suffer physical injury, abuse, or neglect.

**COUNT 2**

ASSAULT, (6) 76-5-102 UCA, class B misdemeanor, as follows: That at the time and place aforesaid the defendant did attempt, with unlawful force or violence, to do bodily injury to another; did threaten, accompanied by a show of immediate force or violence, to do bodily injury to another; or did commit an act, with unlawful force or violence, that caused bodily injury to another or created a substantial risk of bodily injury to another.

This information is based on evidence obtained from witness Phil Rogers.

PROBABLE CAUSE STATEMENT: The undersigned prosecutor is a Deputy Davis County Attorney and has received information from the investigating officer, Phil Rogers of the North Salt Lake Police Department, and the Information herein is based upon such personal observations and investigation of said officer.

On September 26, 2003 defendant assaulted the victim, a disabled adult, hitting him in the face and chest.

Authorized September 29, 2003  
for presentment and filing:

MELVIN C. WILSON  
Davis County Attorney

By

  
Deputy Davis County Attorney



Tab B



2nd District - Farmington COURT  
DAVIS COUNTY, STATE OF UTAH

---

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	JURY TRIAL
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 031701596 MO
	:	
RONALD KENT JACOBSEN,	:	Judge: DARWIN C. HANSEN
Defendant.	:	Date: April 16, 2004
Custody: DCJ	:	

---

PRESENT

Clerk: karensd  
Prosecutor: POLL, BRANDON L  
Defendant  
Defendant's Attorney(s): ARRINGTON, C MARKLEY

DEFENDANT INFORMATION

Date of birth: May 1, 1954  
Video  
Tape Count: 9:05

Criminal Sentence, Judgment, Commitment @J



JD11595036  
031701596 JACOBSEN, RONALD KENT

CHARGES

1. ABUSE OF DISABLED OR ELDER ADULT - Class A Misdemeanor  
- Disposition: 04/16/2004 Guilty
2. SIMPLE ASSAULT - Class B Misdemeanor  
- Disposition: 04/16/2004 Guilty

TRIAL

Oath to Jurors on Voir Dire Examination is administered.  
Jury selection concludes.  
Brandon Poll, prosecutor for the State, introduces himself and lists his witnesses.  
Mr. Arrington introduces himself and lists potential witnesses.  
Counsel pass the jury for cause.  
Premptory challenge is administered and the jury is selected.  
Oath to jurors impaneled to try a case is administered.  
Court takes a recess and reconvenes at 10:31 a.m.  
Preliminary jury instructions are given.

Case No: 031701596  
Date: Apr 16, 2004

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The Information is read.  
Mr. Poll makes opening statements to the Court.  
Mr. Arrington makes opening statements to the Court.  
State's witness Ronald G. Jacobsen Sr. is sworn and testifies.  
Cross examination by Mr. Arrington.  
The witness is excused.  
State's witness Phil Rogers is sworn and testifies.  
States exhibit 4, 2, 3, 1 are offered and received.  
Cross examination by Mr. Arrington.  
The witness is excused.  
The State rests.  
The Court takes a lunch break at 11:49 and reconvenes at 1:22 p.m.  
Mr. Arrington states they will have no witnesses testify and they rest their case.  
Jury instructions are given.  
Court recesses at 1:31 and reconvenes at 1:38.  
Mr. Poll gives closing statements.  
Mr. Arrington gives closing statements.  
The Oath is given to the Bailiff.  
The Jury leaves to begin deliberations at 2:40 p.m.  
Court reconvenes at 3:25 p.m.  
The verdict is read and when polled, the jury's decision was unanimous.  
Defendant is found guilty on both counts. Defendant waives the waiting period and requests sentencing today.  
The State recommends Defendant be ordered into alcohol treatment and there is a concern as to where Defendant will live upon release. They recommend a period of time before he returns to the home of his parents. The original order of no contact was lifted in October. Defendant has served 35 days in the Davis County Jail. He failed to appear in November 2003 and a warrant was issued. He's been in jail since arrested because of failure to make bail.

#### SENTENCE JAIL

Based on the defendant's conviction of ABUSE OF DISABLED OR ELDER ADULT a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s) in the Davis County Jail. The total time suspended for this charge is 325 day(s).  
Based on the defendant's conviction of SIMPLE ASSAULT a Class B Misdemeanor, the defendant is sentenced to a term of 180 day(s) in the Davis County Jail. The total time suspended for this charge is

Case No: 031701596  
Date: Apr 16, 2004

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180 day(s).

Commitment is to begin immediately.

Credit is granted for time served.  
Credit is granted for 35 day(s) previously served.

#### SENTENCE FINE

Charge # 1	Fine: \$8050.00
	Suspended: \$7550.00
	Surcharge: \$243.24
	Due: \$500.00

Charge # 2	Fine: \$1850.00
	Suspended: \$1850.00

Total Fine:	\$9900.00
Total Suspended:	\$9400.00
Total Surcharge:	\$243.24
Total Principal Due:	\$500.00
	Plus Interest

#### SCHEDULED TIMEPAY

The following cases are on timepay 031701596.  
The defendant is to pay \$50.00 monthly on the 30th.  
The number of payments scheduled is 9.  
The first payment is due on 5/30/2004 the final payment of \$.58.18 is due on 02/28/2005. The final payment may vary based on interest.

#### ORDER OF PROBATION

The defendant is placed on probation for 18 month(s).  
Probation is to be supervised by POSITIVE ADJUSTMENTS.  
Defendant to serve 40 day(s) jail.  
Defendant is to report to the Davis County Jail.

Defendant is to pay a fine of 500.00 which includes the surcharge.  
Interest may increase the final amount due.  
Pay fine to The Court.

Case No: 031701596  
Date: Apr 16, 2004

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PROBATION CONDITIONS

CONDUCT: Commit no further violations of the law.

ALCOHOL: Do not use or possess alcoholic beverages or frequent places where alcohol is the chief item for sale.

EVALUATION: Evaluation by Davis County Alcohol and Drug or Davis County Behavioral Health and successful completion of any program that they suggest.

PROGRAM/TREATMENT: Enter, participate in and complete any program, counseling or treatment as directed by AP&P.

OTHER: Do not purchase alcohol for the victim.

SENTENCE PROBATION SERVICE NOTE

If Defendant has an alcohol related violation, the Court will consider this a violation of probation and it will be a much harsher punishment. If antebuse is recommended, Defendant is to comply with this recommendation.

Dated this 20 day of Apr., 2004.

  
DARWIN C. HANSEN  
District Court Judge

Tab C

1 MS. MANGRUM: No.

2 THE COURT: All right. Do you feel like you could  
3 give fair consideration to both sides if you're called to serve  
4 on this jury?

5 MS. MANGRUM: Yes.

6 THE COURT: Thank you very much.  
7 Anyone else on the back row?

8 All right. We're talking about close friends or  
9 family members who work in law enforcement. On the front row  
10 there were some hands I know. Mr. — is it Progeess?

11 MR. PROGEES: Progeess.

12 THE COURT: All right. Thank you.

13 MR. PROGEES: Yes. I have a good friend that's a  
14 corporate lawyer, and a good friend that's on the Utah Highway  
15 Patrol.

16 THE COURT: All right. I take it your good friend  
17 who's a corporate lawyer really doesn't get involved in the  
18 criminal law then, especially.

19 MR. PROGEES: No, sir.

20 THE COURT: Your friend on the Highway Patrol I  
21 expect probably does —

22 MR. PROGEES: Yes.

23 THE COURT: — and probably testifies in court from  
24 time to time.

25 MR. PROGEES: Yes, sir.

1 THE COURT: Therefore, would you be inclined to give  
2 more credibility to a police officer who testifies as opposed  
3 to a lay witness in court?

4 MR. PROGRESS: I don't know if I'd give more  
5 credibility, but I think they probably pay attention to detail  
6 a little bit more than the average person.

7 THE COURT: At this stage of the proceedings, would  
8 your tendency be to favor the prosecution over the defense?

9 MR. PROGRESS: No.

10 THE COURT: All right. Anyone else on the front row?  
11 Mr. Munson.

12 MR. MUNSON: Because I work at Lagoon, I work with -  
13 have worked with several Farmington City police and also the  
14 sheriff, and three in particular are pretty close friends from  
15 the Davis County sheriff's department.

16 THE COURT: Okay. We're going to have some Davis  
17 County sheriff people testify. Are you going to be more  
18 inclined at this stage to give their testimony more credibility  
19 simply because they're with the Davis County Sheriff's Office?

20 MR. MUNSON: I don't think so.

21 THE COURT: Can I pursue that a bit?

22 MR. ?: (inaudible).

23 THE COURT: Let me ask you a question, if I may, and  
24 again I ask you this just because all of us are nothing more  
25 than the sum total of our life's experience. We have friends



1 from all different walks of life, and so sometimes it's hard  
2 for us to evaluate where we are in this circumstance we find  
3 ourselves in today where we may be called upon to serve on a  
4 jury.

5 So with those comments by way of a predicate, let me  
6 give you a hypothetical. If you were seated here at defense  
7 table as the defendant, and somebody is in the jury with a  
8 close relationship between an agency who will be testifying in  
9 that trial, would you be uncomfortable?

10 MR. MUNSON: Yeah, I think so.

11 THE COURT: I appreciate your candor. My sense is  
12 that if it were me, I probably would be, too. So what I think  
13 the appropriate thing to do is, Mr. Munson, excuse you, if you  
14 don't mind -

15 MR. MUNSON: Okay.

16 THE COURT: - and we'll call another to take your  
17 place. And I say that not in terms of any negative fashion,  
18 but just the fact that your experience, given the nature of  
19 this case, probably suggests that maybe somebody that has some  
20 other kind of experience would be better suited to be on the  
21 jury, whereas in another circumstance, that may be a case where  
22 you ought to be on the jury. So I hope you don't mind our  
23 taking this action.

24 MR. MUNSON: Okay.

25 THE COURT: Thank you very much.

1 MR. POLL: And, your Honor, we don't have any  
2 witnesses from the Davis County sheriff's office.

3 THE COURT: Well, I understand that, but you have  
4 police officers here in Davis County.

5 MR. POLL: That's correct.

6 THE COURT: All right. Thank you. Let's proceed.

7 THE CLERK: Chantelle Schow.

8 THE COURT: Ms. Schow, let us catch you up, please.  
9 Would you answer the questions on the white board?

10 MS. SCHOW: My name is Chantelle Schow. I live in  
11 Clinton. I'm married. I have two children, six and three. I  
12 have a high-school education. I am currently a homemaker. My  
13 husband is in network information. And in my spare time I like  
14 to read, play with my children, and networking.

15 THE COURT: Thank you. Please be seated. Are you  
16 acquainted with Mr. Poll or any witnesses whom he introduced?

17 MS. SCHOW: No.

18 THE COURT: Or Mr. Arrington or the defendant in this  
19 case?

20 MS. SCHOW: No.

21 THE COURT: Have you heard anything about the case  
22 from any source?

23 MS. SCHOW: No.

24 THE COURT: Have you served on a jury in the past?

25 MS. SCHOW: No.

1           THE COURT: Do you have any difficulty in given us  
2 your best effort during this one day of trial?

3           MS. SCHOW: No.

4           THE COURT: All right. Do you have a close friend or  
5 family member that's ever been the victim of a crime?

6           MS. SCHOW: No.

7           THE COURT: Or charged with a crime?

8           MS. SCHOW: I have a brother that was charged with a  
9 DUI.

10          THE COURT: All right. How long ago was that?

11          MS. SCHOW: Three years ago.

12          THE COURT: And was that handled as part of the  
13 judicial system?

14          MS. SCHOW: It was settled out of court.

15          THE COURT: All right. Was there anything about that  
16 that would cause you to have any negative feelings about the  
17 judicial system?

18          MS. SCHOW: No.

19          THE COURT: Or would it cause you to favor one side  
20 over the other at this stage in this case?

21          MS. SCHOW: No.

22          THE COURT: Okay. Thank you. Do you have any  
23 friends or family members that work in law enforcement?

24          MS. SCHOW: I have a brother that works at Box Elder.

25          THE COURT: As a sheriff?

1 MS. SCHOW: No. Juvenile work.

2 THE COURT: So he's in the juvenile system?

3 MS. SCHOW: Uh-huh (affirmative).

4 THE COURT: Would that cause you in this trial to

5 favor a police officer's testimony over a non-police officer's

6 testimony simply because they're a police officer?

7 MS. SCHOW: No.

8 THE COURT: All right. Thank you. All right. Is

9 there anyone else that we haven't talked to that had

10 association with law-enforcement people?

11 All right. Let's go to Ms. Carlos, and then we'll

12 come back to you, Mr. Johnson.

13 MS. CARLOS: My brother-in-law is an officer for

14 Sunset City.

15 THE COURT: All right. And the same questions then

16 would apply in your case. Does that cause you in this case to

17 favor one side over the other at this stage?

18 MS. CARLOS: Well, I - I mean possibly.

19 THE COURT: Is that the reason for your hesitancy?

20 MS. CARLOS: Yes.

21 THE COURT: Okay. So you think maybe it would

22 influence you?

23 MS. CARLOS: Possibly yeah, it would.

24 THE COURT: All right. Again, I appreciate your

25 candor. We'll excuse you, Ms. Carlos.

1           Now, before we call another to take your place, let  
2 me just talk for a minute to you, Mr. Johnson. What's your  
3 knowledge or friendship with law-enforcement people?

4           MR. JOHNSON: I have friends in Kaysville City that  
5 work for Kaysville - Layton also on the UHP.

6           THE COURT: All right. And again, would that cause  
7 you to favor the testimony of a police officer in the sense  
8 that you would give that officer more credibility simply  
9 because they're police officers?

10          MR. JOHNSON: I do believe so.

11          THE COURT: I'm going to release you, too,  
12 Mr. Johnson. Thank you.

13          And I'll ask the clerk to call two names. The first  
14 will take the place of Ms. Carlos, the second Mr. Johnson.

15          THE CLERK: Kathleen Marie White.

16          THE COURT: Ms. White, if you would be seated where  
17 Ms. Carlos was seated, we would appreciate that.

18          THE CLERK: And Melanie Ann MacFarlane.

19          THE COURT: And Ms. MacFarlane, please be seated in  
20 Mr. Johnson's chair. And if we may, ladies, we'll want to  
21 catch you up. Let's start with you, Ms. MacFarlane. Would you  
22 answer the questions on the white board, please?

23          MR. MacFARLANE: Yeah. I'm Melanie MacFarlane. I  
24 live in Sunset. I'm single. I have a high-school diploma. I  
25 work at the driver's license division in Brigham City. And I

1     like to read (inaudible).

2                 THE COURT: All right. Thank you very much.

3                 Ms. White, likewise would you answer those questions?

4                 MS. WHITE: I'm Kathleen White. I live in Layton.  
5     I'm married. I have an eleven-year-old daughter. I finished  
6     my junior year of college, theater-arts major. I'm a homemaker  
7     now. My spouse's occupation is a technical engineer at  
8     Hill Air Force Base. And spare time, I like reading science  
9     fiction and fantasy.

10                THE COURT: All right. Thank you. Now, let me ask  
11     you two ladies together, if I may. Do either of you know  
12     Mr. Poll or the persons whom he introduced?

13                MS. WHITE: No.

14                MS. MacFARLANE: No.

15                THE COURT: Do you know Mr. Arrington or the  
16     defendant in this case.

17                MS. MacFARLANE: No.

18                MS. WHITE: No.

19                THE COURT: All right. Have either of you heard  
20     anything about the case from any source?

21                MS. MacFARLANE: No.

22                MS. WHITE: No.

23                THE COURT: Have either of you been on a jury in the  
24     past?

25                MS. WHITE: No.

1 MS. MacFARLANE: No.

2 THE COURT: Okay. Do either of you have difficulty  
3 giving us your best efforts today during this one-day trial?

4 MS. WHITE: No.

5 MS. MacFARLANE: No.

6 THE COURT: All right. Thank you. Do either of you  
7 have a close friend or family member that's ever been the  
8 victim of a crime or been charged with a crime?.

9 MS. MacFARLANE: No.

10 MS. WHITE: No.

11 THE COURT: Okay. Do either of you have close  
12 friends or family members that work in law enforcement? And  
13 the answer is no. All right. Thank you.

14 Now, is there anyone else on the law-enforcement  
15 issue that I've overlooked here?

16 Ms. Mangrum.

17 MS. MANGRUM: When he was introducing the officers,  
18 there was an officer I noticed in the courtroom, but I didn't  
19 hear his name called with the two officers.

20 THE COURT: Could you indicate the witnesses,  
21 Mr. Poll?

22 MR. POLL: Our two officers are Phil Rogers and  
23 Andrew Bryson. There was another officer that was briefly in  
24 here. It was John Herndon. He's not a witness.

25 MS. MANGRUM: I've seen John Herndon, I think -

1 THE COURT: Okay.

2 MS. MANGRUM: - in the paper.

3 THE COURT: All right. Thank you.

4 Ladies and gentlemen, let me move to one other area  
5 then, if I may, that deals with criminal law, and I'm going to  
6 ask this question to the panel as a whole. In our system of  
7 criminal justice, when a person is charged with a criminal  
8 offense, they are presumed to be innocent until they're proven  
9 guilty by the prosecution, and the nature of that proof must be  
10 beyond a reasonable doubt. So the fact that a person is  
11 charged with a crime, as a matter of law they are presumed to  
12 be innocent until the prosecution overcomes that presumption.

13 So is there any of you that cannot give the defendant  
14 the presumption of innocence as you see him today seated here  
15 at defense counsel table? If there are any of you who feel you  
16 cannot do that, would you please raise your hand? All right.  
17 Thank you very much.

18 Now, you've heard me ask a number of you about police  
19 officers. I'm going to ask this to the whole panel because  
20 this question hasn't been given to all of you. Is there anyone  
21 on the panel who would believe or feel that the testimony of a  
22 police officer, simply for that reason only, is more credible a  
23 lay-witness person who testifies? If so raise your hand.

24 Mr. Northrop.

25 MR. NORTHROP: I would think so just because they're



1 in the system more and they're more around this kind of  
2 business. They should know more, more credible.

3 THE COURT: Well, I appreciate your -

4 MR. NORTHROP: That's (inaudible) reason.

5 THE COURT: I appreciate your comment about that,  
6 sir, but I think I'm going to excuse you, if I may, and we'll  
7 call another to take your place.

8 THE CLERK: Russell Jay Yahne.

9 THE COURT: Would you be seated in Mr. Cooper's  
10 chair, please?

11 MR. COOPER: Are you asking me to leave?

12 THE COURT: Oh, no, I'm not. Mr. Northrop. I'm  
13 sorry, Mr. Cooper.

14 MR. COOPER: Well, I could oblige.

15 THE COURT: That was close, huh? All right.

16 And how do you pronounce your name, sir?

17 MR. YAHNE: Yahne.

18 THE COURT: Yahne? All right. Mr. Yahne, we'll have  
19 to catch you up. Would you answer the questions on the white  
20 board, please?

21 MR. YAHNE: Okay. My name is Jay Yahne. I live in  
22 Layton, Utah. I'm married. I have one daughter, seven months.  
23 My education is I have a master's degree in civil engineering.  
24 My occupation is I own a geotechnical engineering firm in  
25 Layton. My wife's occupation is she works part time with me in